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No. 04-495

In The Supreme Court Of The United States

REGINALD WILKINSON, et al.,

Petitioners,

v.

CHARLES E. AUSTIN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Where state prison officials decide to place a prisoner in a "super-maximum security" facility based on a predictive assessment of the security risk the prisoner presents, but prison regulations create a liberty interest for the prisoner in avoiding such placement, do procedures meeting the requirements specified in *Hewitt v. Helms*, 459 U.S. 460 (1983), satisfy the prisoner's due process rights?

LIST OF PARTIES

The Petitioners are current or former officials of the Ohio Department of Rehabilitation and Correction (ODRC):

Reginald Wilkinson, Stephen Huffman, Todd Ishee, Bruce Martin, Deborah Nixon-Hughes, Cheryl Jorgenson-Martinez, Manish B. Joshi, Patrick F. Biggs, Audrey Sandor Nietzel and Matthew Meyer (collectively "Ohio").

The Respondents are a class of prisoners who have been or may be housed in the Ohio State Penitentiary, Ohio's only supermaximum-security prison. The class representatives are:

Charles E. Austin, Robert Baksi, Michael Benge, Alonzo L. Bonner, August Cassano, David E. Clark, James DeJarnette, Roy D. Donald, David Easley, Brian K. Eskridge, Keith Gardner, Roger Lee Hall, Frederick O. Harris, Jr., Daryl Heard, Edward O. Hodge, Orsino Iacovone, Kunta Kenyatta, Stacy Lane, James D. Mitchell, Emanuel B. Newell, John W. Perotti, Lamar Preston, Jason H. Robb, Kevin B. Roe, Richard Siggers, Eric Swofford, Lahray Thompson, Edward A. Tilley, and Mark Trawick.

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This case involves three relevant opinions: *Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004), Pet. App. 1a–35a; *Austin v. Wilkinson*, 189 F. Supp. 2d 719 (N.D. Ohio 2002) ("*Austin I*"), Pet. App. 47a–121a; and *Austin v. Wilkinson*, 204 F. Supp. 2d 1024 (N.D. Ohio 2002) ("*Austin II*"), Pet. App. 39a–46a.

JURISDICTIONAL STATEMENT

The judgment and opinion below were entered June 10, 2004. No rehearing petition was filed below. On August, 27, 2004, this Court extended the time to file this petition until October 8, 2004. Order Extending Time to File, No. 04A174. Petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case turns on the Fourteenth Amendment to the United States Constitution and former ODRC Policy 111–07.

The Fourteenth Amendment provides, in relevant part, that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

This case is about choosing the right tool for an inherently difficult, and increasingly common, job—determining which inmates must be isolated in a "super-maximum security" prison to reduce danger to all who live or work in a State's prisons. That sensitive task requires "[d]iagnoses, prediction, risk assessment, and identification of causal factors" that "often defy objective criteria." Chase Riveland, *Supermax Prisons: Overview and General Considerations* 9 (U.S. Dep't of Justice, Nat'l Inst. of Corrs. 1999), available at http://www.nicic.org/pubs/1999/014937.pdf (Defendants' Ex. R). The question here is whether the Due Process Clause was satisfied by the procedures that Ohio established for deciding which prisoners belong in our highest-security prison, the Ohio State Penitentiary (OSP). The answer is yes, as Ohio's procedures more than satisfied the constitutional minimum here, and the courts below were wrong to saddle Ohio with additional procedural burdens.

Ohio's process, which gives inmates notice and a right to be heard before a placement decision, is more than adequate because the decisions at issue are the type of predictive, multivariate decisions that this Court has discussed in *Hewitt v. Helms*, 459 U.S. 460 (1983); *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979); and *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). Such decisions, the Court has explained, are, because of their nature, "singularly unsuited for 'proof' in any highly structured manner." *Hewitt*, 459 U.S. at 477 n.9. The Court thus requires only "an informal, nonadversary evidentiary review" involving notice and some opportunity for an affected person to present his views. *Id.* at 476. Ohio gives that and more.

But the decision below demanded much more, requiring a qualitatively different type of process, the type required for

disciplinary hearings by *Wolff v. McDonnell*, 418 U.S. 539 (1974). Because *Wolff*-type process is designed for retrospective determination of specific facts (whether an inmate violated prison rules), it requires very different procedures: detailed advance notice of specific charges, the right to call witnesses, and written findings stating the evidence and reasoning underlying the decision.

Such *Wolff*-type procedures do not add any value or improve the quality of the decisionmaking here, where the substantive decision in question is predictive, not retrospective, and involves subjective judgment based on many factors. *Wolff* process makes sense where prison officials are punishing prisoners for past wrongdoing, but supermax placement is about safe and effective prison management, not punishment. "Wardens [] invoke this procedure as a *preventative* . . . measure." Riveland, *supra*, at 8–9 (emphasis added).

Forcing prison officials to provide *Wolff*-type factfinding procedures, even though the officials are making a predictive assessment, simply does not make sense. *Wolff*'s retrospectively focused procedures are a poor fit for the task at hand. Bad decisions result, and those decisions in turn impose significant potential harm on both prison staff and other inmates.

As the Plaintiffs' leadoff witness acknowledged: "Human rights concerns cut both ways . . . . We are concerned about the rights of inmates to be safe and free from assaults or being preyed upon by dangerous inmates." Trial Tr. Vol. 1, at 81 (Fellner Testimony ("Test.")). The decision below hinders Ohio's ability to address that harm. Ohio therefore asks the Court to reverse that decision, and to restore our ability to provide a safer and more secure prison environment.

STATEMENT OF THE CASE

Three sets of facts are relevant here: the purpose of supermax prisons and the nature of the decisions about which inmates should be housed there, the system controlling Ohio's supermax placements, and the proceedings below.

A. The purpose of supermax prisons and the process for determining which inmates should be housed there.

Supermax prisons are intended to concentrate the most dangerous inmates within a jurisdiction in a single facility in order to make the entire system safer. Such facilities were developed to deal with a "perceived 'toughening' of the inmate population, increased gang activity [and] the difficulty of maintaining order in severely overcrowded prisons." Riveland, *supra*, at 1; accord *Supermax Housing: A Survey of Current Practice* 3 (U.S. Dep't of Justice, Nat'l Inst. of Corrs. 1997), available at http://www.nicic.org/pubs/1997/013722.pdf .

Although typically only those inmates who have engaged in serious misconduct are placed in such facilities, supermax placement has a preventive rather than punitive goal: averting future problems by segregating disruptive inmates. J.A. 310–11, 318–20 (Ishee Test.); *id.* at 464–65 (Collins Test.). "Wardens [] invoke this procedure as a preventative . . . measure." Riveland, *supra*, at 8–9. It is "a non-disciplinary status—that is, the placement is not a penalty with a determinate time affixed to it, but is based on a pattern or history of dangerousness or unconfirmed but reliable evidence of pending disruption." *Id.* at 8.

Because of that prophylactic function, decisions about which inmates are housed there are predictive and multivariate. The placement decisions are not based on any

one fact or group of facts because "[d]iagnosis, prediction, risk assessment, and identification of causal factors to violent acting out often defy objective criteria." Riveland, *supra*, at 9. Decisionmakers therefore "need to look at the inmate's entire profile," J.A. 269–70 (Fellner Test.); see also *id.* at 437–39, 450–52 (Dr. Austin Test.).

Further, an individual inmate's "behavior isn't the only decision here that is being weigh[]ed . . . [y]ou have to look at other factors." J.A. 452 (Dr. Austin Test.). In particular, prison officials must consider "the overall situation in the entire prison system . . . if things are problematic elsewhere, [prison officials] are going to be reluctant to be releasing people that have a history. So they are looking at the entire picture." J.A. 451 (Dr. Austin Test.); see also *id.* at 383–84 (Riveland Test.), 460–61 (Huffman Test.).

Thus, experts agree that, given the nature of the decision to be made and the range of data involved, supermax placements cannot be made through the simple application of objective criteria. Although objective factors are part of that process, the decision is primarily intuitive. "[U]ltimately, it's going to be a subjective judgment by a person or an office . . . based on their experience and how they feel about the risk . . . that judgment call is necessarily subjective." J.A. 433–34 (Dr. Austin Test.); see also J.A. 267–78 (Fellner Test.), 432, 441–42 (Dr. Austin Test.).

B. Ohio's process for selecting inmates for placement in supermax.

1. Background.

Ohio's only supermax prison, the Ohio State Penitentiary (OSP), opened in 1998. At first, the process for determining which inmates were housed there was less than

consistent. Ohio carefully analyzed the matter, and in 1999, Ohio issued the first version of Policy 111-07. That document put forth general criteria for placement at OSP and set procedures for deciding which inmates should be placed and kept there. Defendants' Ex. B (Trial Tr. Vol. 4 at 1181–82).

Ohio was still not satisfied with its procedures and, before this case was filed, began to further study the matter. Prison officials formed an internal committee and retained a national expert in evaluating prisoners' security risks. That resulted in a second iteration of Policy 111-07, issued in January of 2002 (the "Policy" or "New Policy"). J.A. 15–69. This New Policy provided more guidance to all involved in the classification process regarding what factors should be considered in weighing whether a particular inmate belongs in supermax. The Policy does not establish a formula or include any quantitative point system; rather, it calls for the officials to exercise judgment regarding the totality of the several prescribed factors. Moreover—and of particular importance here—the Policy significantly increased the process given when deciding whether a prisoner should be placed or retained in supermax status.

Ohio scheduled the New Policy to be effective on March 1, 2002, but the district court preempted that plan when it found the New Policy to be unconstitutional. The district court ordered several modifications to the New Policy, resulting in a version effective, pursuant to court order, on May 22, 2002 (the "Court-ordered Policy"). Petitioners, Ohio prison officials, contend that the court-ordered modifications were unnecessary, as, in our view, the New Policy already exceeded constitutional requirements. Consequently, this case concerns the constitutionality of the New Policy. The procedures described below are those that the New Policy provided, or, more precisely, that the New

Policy would have provided, had it gone into effect (and that the Policy will provide if this Court reverses).

2. Analyzing inmates for supermax placement.

Every Ohio prisoner is assigned a security classification from Level 1 (lowest risk) to Level 5 (highest risk, or supermax). The level represents a predictive assessment of the risk the prisoner presents, and it is based on several factors, including his offense, previous record and gang affiliations. A prisoner receives an initial classification upon entering prison, but that is subject to change at any point during his incarceration. Prisoners classified at Level 1 through Level 4 are housed in prisons throughout Ohio. Inmates classified at Level 5, however, are automatically transferred to OSP. See ODRC Policy 53-CLS-01 § V, available at http://156.63.250.98; Policy § VI(B)–(D), J.A. 18–24.

Under the Policy, any of several listed prison officials may initiate a classification review for any reason. See Policy, § VI(C), J.A. 20. However, as a practical matter, officials initiate such a review only after one of two events: (1) an independent finding, in proceedings before the Rules Infraction Board that comply with *Wolff*, that the inmate has engaged in disruptive conduct, see Ohio Admin. Code § 5120-9-07, or (2) the inmate's conviction for a new crime committed while in prison. In addition, the Policy provides that an inmate may be classified as Level 5 at "reception," when he first enters the prison system after his conviction. Policy § VI(A), J.A. 17–18. In all cases, regardless of why the classification review was initiated, the process for analyzing a proposed placement is the same. Policy § VI(C), J.A. 20–24.

While events such as a disciplinary finding or a criminal conviction are potential triggers for classification, neither event automatically results in Level 5 placement or even consideration for such a placement. Instead, such consideration occurs only if one of the listed officials believes that the underlying conduct demonstrates an increased risk of future disruption, and thus a need to consider reclassification. If so, he or she initiates a classification review, which stands apart from any prior disciplinary proceeding.

The classification review begins with a written report reviewing the inmate's characteristics and conduct more broadly (i.e., age, time remaining on sentence, escape attempts, gang affiliations, history of violence in prison, etc.). Officials then conduct a more detailed examination of the risk presented by the prisoner's presence in his current security level, following the factors outlined in the Policy and further detailed in accompanying forms. Policy § VI(C), J.A. 20–22; Security Designation (Long Form), J.A. 38–45.

A three-member classification committee then holds a hearing to review the matter. The inmate is notified at least 48 hours before the hearing, and the notice includes a brief summary of the event triggering the proceedings. Policy § VI(C), J.A. 22; Notice of Hearing Form, J.A. 58–59. The Policy provides for the inmate to appear, if he wishes, and to submit both oral and written statements. *Id.*

The committee assesses the inmate's propensity for disruptive behavior, and it recommends whether the inmate should be classified at Level 5. The committee sends that recommendation to the warden of the prison where the inmate is housed, along with a report. That report includes a narrative description of "the nature of the threat the inmate presents and the committee's reasons for the recommendation." J.A. 64. The inmate is given a copy of

the recommendation and may object in writing. Policy § VI(C), J.A. 23; Summary of Inmate's Information Form, J.A. 69; Summary of Staff's Information Form, J.A. 60; Classification Committee Report, J.A. 61–65.

The Warden reviews the recommendation and decides whether he agrees. If the Warden disagrees with a Level 5 placement recommendation, he vetoes it and the process ends there. If he agrees that Level 5 placement is appropriate, he forwards the matter to the Bureau of Classification for final decision. The inmate may object to a warden's approval of Level 5 placement. If the Bureau approves the placement, the prisoner is reclassified at Level 5 and transferred to OSP. Policy § VI(C), J.A. 23.

The inmate receives a final, fail-safe evaluation after he arrives at OSP. That review usually occurs within five days of his arrival and must occur within thirty days. J.A. 329 (Ishee Test.); Policy § VI(E), J.A. 25. At that time, OSP staff review his file and evaluate the propriety of the placement decision, and report to the OSP Warden. If the OSP Warden determines that the inmate does not belong in OSP, he sends a report with that recommendation to the Bureau of Classification, and the Bureau decides whether the inmate should stay at OSP. Policy § VI(E), J.A. 24–25. Such fail-safe reviews by the OSP Warden are not perfunctory, as some inmates have had their Level 5 classifications reduced as a result of the OSP Warden's reconsideration. J.A. 328–30 (Ishee Test.).

3. Analyzing whether inmates are retained in supermax.

Ohio also provides significant process when deciding whether a prisoner will stay in supermax. An annual review considers a variety of factors relevant to a predictive

assessment of the risk that might be incurred if the inmate's classification is reduced. Those factors include the inmate's underlying criminal offense, the time left on his sentence, the reasons for supermax placement, the time since placement, his conduct at OSP, whether he has taken advantage of programming, and his interaction with staff. Policy § VI(I), J.A. 30–33; Privilege/Security Level Review Form, J.A. 66–69.

An inmate receives 48 hours' written notice of a retention hearing, just as he does for an initial Level 5 placement proceeding. Again, a three-member classification committee considers the matter. The inmate may, if he wishes, appear before the committee and give oral and written statements. Policy § VI(I), J.A. 30–31; Notice of Hearing Form, J.A. 58.

The committee sends its recommendation to the OSP Warden. The inmate receives a copy of that recommendation and may file objections. The Warden then accepts or rejects the recommendation and passes his decision to the Bureau of Classification for further review. The inmate may also object to the Warden's action, and the matter is submitted to the Bureau for final disposition. Policy § VI(I), J.A. 32–33; Privilege/Security Level Review Form, J.A. 66–69.

In addition to this annual review of Level 5 status, the inmate also receives more frequent reviews regarding his privilege level within Level 5. Inmates are classified as 5A or 5B, and while all Level 5 inmates are at OSP, the 5A inmates receive greater privileges, such as more phone calls, longer visits, broader TV privileges, shared recreation with another inmate, and the like. Level 5B inmates have their privilege levels reviewed every three months, and Level 5A inmates are reviewed every six months. (The difference in frequency favors inmates, as the lower-level 5Bs have more

frequent opportunities to move up.) The privilege-level reviews involve the same factors as the security-level retention proceedings, so an inmate's privilege-level review provides significant feedback on the inmate's progress toward eventual reduction from Level 5 to Level 4. Compare Policy § VI (H), with § VI(I).

C. The proceedings below.

Respondents are a class of prisoners who challenged the procedures for deciding which inmates are placed and kept in supermax status. They claimed that they had a liberty interest in staying out of supermax and that the processes for determining which inmates are placed and kept there were constitutionally inadequate.

The district court found a liberty interest and turned to the question of what process is due. It concluded, "at a minimum, inmates at the OSP should be afforded the same procedural protections as those described in *Wolff*." *Austin I*, Pet. App. 101a. It therefore ordered Ohio to provide the protections listed in *Wolff*, along with other specific protections beyond *Wolff*, including the following:

- Inmates must be provided "advanced written notice of all the specific evidence" to be considered. Matters not so identified cannot be considered. *Austin I*, Pet. App. 106a, 114a; *Austin II*, Pet. App. 39a–40a.

- Inmates must be allowed to call witnesses absent overriding security considerations. *Austin I*, Pet. App. 106a; *Austin II*, Pet. App. 42a.

- Decisionmakers are restricted in the use of confidential information; specifically, if officials wish to rely on the statement of a confidential informant, they must "indicate this reliance and shall disclose as much of the substance of the information as possible." *Austin II*, Pet. App. 40a–41a (internal quotation marks omitted).

- Decisionmakers must provide exhaustive, "detailed and specific justification for [their] decision[s]." *Austin II*, Pet. App. 42a; *Austin I*, Pet. App. 120a. Not only must the classification committee issue such an opinion, but on appeal, both the Warden and the Bureau of Classification must provide written justifications as well. *Austin II*, Pet. App. 41a–42a; *Austin I*, Pet. App. 120a.

- The court also ordered that inmates already in Level 5 be told "what specific conduct is necessary . . . to be reduced from Level 5 and the amount of time it will take before" that occurs. *Austin II*, Pet. App. 44a.

Ohio appealed, arguing that *Wolff*-type procedures were not required, and were thus improperly imposed. Ohio said that *Wolff* was a poor fit because its procedures are aimed at determining specific historical facts, while a supermax placement decision is a predictive, subjective decision, based on a wide range of factors. Ohio urged the use of the more flexible model adopted for predictive decisions in *Hewitt*, *Greenholtz*, and *Horowitz*, and argued that our New Policy provided far more process than those cases require.

The Sixth Circuit rejected that argument. Two judges concluded that all deprivations significant enough to implicate a liberty interest under *Sandin*'s heightened standard are serious enough to create a presumption that *Wolff*-type procedures are necessary. *Austin*, Pet. App. 21a–22a. "Any liberty interest which passes *Sandin*'s threshold comes with a higher presumption of process due." *Id.* at 22a n.12. The majority also discounted the significance of the predictive nature of the underlying decision: "It is not the nature of the decision which strikes the due process balance; it is the nature of the interests on both sides of that balance." *Id.* at 18a–19a. The third judge concurred in part and dissented in part, disagreeing with the imposition of the "comprehensive notice requirement," but agreeing with the imposition of other procedures. *Id.* at 35a (Rogers, J., concurring in part and dissenting in part).

Ohio now asks this Court to reverse the Sixth Circuit's judgment that Ohio violated the inmates' due process rights in reclassifying them and transferring them to OSP.

SUMMARY OF ARGUMENT

This case turns on two major propositions, one legal, and one factual, and together they leave no doubt that Ohio's procedures for placing prisoners in a "supermax" facility go far beyond what due process requires.

First, this Court's precedents establish that informal, non-adversarial procedures satisfy due process when prison officials make predictive judgments, such as prison placements generally. Such placement decisions turn on subjective judgment calls and on prison officials' expertise, and do not result from the application of a set formula. Thus, the quality of such decisions would not be enhanced by the type of procedures aimed narrowly at retrospective factfinding, such as those used in disciplinary proceedings.

This principle flows directly from the three-part balancing test enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and developed in cases such as *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). In such cases, the Court has fully explained why, even outside the prison context, predictive judgments are categorically different from retrospective factfinding, thus requiring less formal procedures.

Equally important, the Court has repeatedly applied this principle in the prison context. Specifically, in *Hewitt v. Helms*, 459 U.S. 460 (1983), the Court explained how placement in administrative segregation is a predictive judgment that does not require the type of formalized process that the Court has required in prison-discipline cases.

The court below largely agreed with this description, but thought that *Sandin v. Conner*, 515 U.S. 472 (1995), changed the rules for determining what process is due under *Mathews* and *Hewitt*. But in fact, *Sandin* concerned only the

test for the existence of a liberty interest, and thus governs only *whether* due process is required at all, not *what* process is due.

Second, under this established legal framework, the facts here show that Ohio's prison placement decisions are, in fact, predictive decisions, and thus fall squarely under the *Hewitt* framework. Such decisions are not converted from predictive to retrospective merely because Ohio's prison officials consider historical facts such as inmate misconduct, as the placement decisions are not made to punish inmates for that past misconduct, but are made to prevent future problems. The *Wolff*-type procedures imposed below do not add to the quality of the decisions, but instead degrade the process and add unneeded costs.

Moreover, applying the other *Mathews* factors to the facts here further confirms that *Wolff* process is not required. A prisoner's interest in avoiding OSP is not that strong, while Ohio's interest in removing disruptive inmates from the general population is a strong one, as such transfers not only benefit orderly prison administration and protect staff, but ultimately protect other inmates from their fellows.

For these and other reasons below, the judgment below should be reversed.

ARGUMENT

A. Due process does not require detailed formal procedures in situations involving predictive decisions.

While the Court has never specifically addressed the process due for placement in a supermax facility, it has addressed similar decisionmaking processes, both outside and inside the prison context. And in addressing similar decisional processes, the Court has consistently distinguished between, on one hand, decisions that are predictive, subjective, and multivariate, and on the other hand, decisions that are narrowly retrospective, such as disciplinary decisions. The Court has consistently concluded that due process does not require formalized adversarial procedures when public officials make decisions of the first type.

1. In predictive-decision cases, the nature of the decision is the most important *Mathews* factor.

In *Mathews v. Eldridge*, the Court set forth the three-part balancing test to be used in deciding what process is due before the State deprives an individual of a liberty or property interest. 424 U.S. at 334–35. The Court prefaced those factors with the reminder that due process "is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The Court then set out "three distinct factors" to be considered:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the

> function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. In evaluating the second factor, regarding the reliability of the challenged procedures and the possible value of extra process, the Court noted that these questions depend on the *nature* of the decision being made. "Central to the evaluation of any administrative process is the nature of the relevant inquiry." *Id.* at 343. That is, the nature of the decision often determines whether additional procedures would add value.

Following *Mathews*, the Court has repeatedly demonstrated how the nature of the decision at issue is the critical factor. One key principle, which arises even outside the prison context, is the distinction between retrospective, fact-specific decisions and predictive, subjective decisions that are based on multiple factors. The Court has repeatedly concluded that procedures appropriate for the former are ill-suited for the latter.

Where the decision at issue is based solely on objective, retrospective factfinding, such as in disciplinary procedures predicated on past conduct, then formalized procedures add value, as they aid in finding facts as precisely as possible. Thus, for example, when the Court addressed the process due for disciplinary proceedings in a school setting, the Court required "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

But in contrast to the disciplinary context, the Court required less formal procedures when a school dismissed a student for academic reasons—and the *nature* of the decision

was the key distinction. See *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). In *Horowitz*, the Court distinguished *Goss* on the grounds that "[a]cademic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full-hearing requirement." *Id.* at 89. The Court detailed several specific ways in which the academic and disciplinary dismissals differed, all rooted in the core distinction between retrospective, objective factfinding and prospective, subjective judgment calls. In *Goss*, the disciplinary case "rested on factual conclusions that the individual students had participated" in specific acts of misconduct. *Id.* By contrast, the academic dismissal in *Horowitz* turned on "subjective and evaluative" decisions about prospects for future success, and those decisions "rested on the academic judgment of school officials." *Id.* at 89–90.

The Court in *Horowitz* also noted that "the determination whether to dismiss a student for academic reasons requires an expert evaluation of *cumulative* information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Id.* at 90 (emphasis added); see also *id.* at 91 n.6 ("[T]he school considers and weighs a variety of factors, not all of which, as noted earlier, are adaptable to the factfinding hearing."). As the concurring opinion put it, "evaluations, which go far beyond questions of mere 'conduct,' are not susceptible of the same sorts of procedural safeguards that are appropriate to determining facts relating to misconduct." *Id.* at 95 n.5 (Powell, J., concurring).

Notably, the Court had no problem categorizing the academic-dismissal decision as prospective, notwithstanding that many of the factors being weighed were retrospective in nature. That is, in making its prospective decision about the student's prospects for success, the school, not surprisingly,

relied largely on the student's historical track record of academic problems. As the Court recounted, the student's history included that "several faculty members expressed dissatisfaction with her clinical performance," that her "performance was below that of her peers," that she had "erratic attendance at clinical sessions," and even "that she lacked a critical concern for personal hygiene." *Id.* at 80–81 (internal quotation marks omitted). All of these retrospective facts were among that the "cumulative information" that, the Court noted, would be considered in the prospective evaluation decision. *Id.* at 90. But the inclusion of those retrospective facts did not alter the fundamentally prospective nature of the decision.

To be sure, any of those individual historical facts could have been subjected to more formalized factfinding and to adversarial challenge. One could even hypothesize that an error could be corrected in the particulars, e.g., that the "erratic attendance" included only X, rather than Y, missed days. But such narrow error-correction, even if it were facilitated by more stringent procedures, would not truly add value when the question being asked was not whether X or Y was the accurate tally, but whether, in light of several factors, the academic experts judged the student likely to have a bright future as a student and doctor. That is, because the *nature* of the decision was ultimately subjective and predictive, formalized procedures would not add to the quality of *that ultimate decision*, even if formalized procedures might have better clarified the precise contours of the student's attendance problems, performance problems, and the like, or allowed the student to better challenge those facts.

Horowitz also establishes another key point—where the decision is predictive, the other *Mathews* factors, especially the private interest affected, carry very little weight, if any. In *Horowitz*, the Court expressly noted that the private-

interest factor of *Mathews* weighed far more heavily in the student's favor in *Horowitz* than it had in *Goss*. The Court explained that it "fully recognize[d] that the deprivation to which respondent was subjected—dismissal from a graduate medical school—was more severe than the 10-day suspension to which the high school students were subjected in *Goss*." *Id*. at 86 n.3. But that did not matter, in light of the drastic difference in the nature of the decision. The Court acknowledged that the private interest at stake was part of the *Mathews* equation, *id*., but found that the nature of the decision remained dispositive.

Thus, even outside the prison context, the Court has firmly established that predictive decisions, especially those that include subjective weighing of multiple factors and the exercise of professional judgment, do not call for stringent due process requirements. That is so even where the individual's private interest seems strong, as the strength of the interest does not overcome the more important point that extra process should not be imposed if it does not aid the decisionmaking process.

2. Under *Hewitt*, prison-placement decisions are the type of predictive decision for which non-adversarial informal process is sufficient.

In the prison context, the Court has explained, and applied, the same distinction that it did in *Horowitz:* predictive, subjective decisions require less formalized due process than retrospective factfinding. And the Court has also plainly demonstrated that prison placement decisions fall on the predictive, subjective side of that divide.

In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court set the benchmark for formalized due process requirements where retrospectively-oriented factfinding is at issue. In *Wolff*, prisoners raised a due process challenge to the

disciplinary proceedings used in Nebraska's prison system. Those proceedings determined whether or not a prisoner committed a given violation, and a "guilty" finding could lead to the loss or withholding of good-time credits as punishment for the misconduct. *Id*. at 547. The Court held that due process required such disciplinary proceedings to include several specific features, including "advance written notice of the claimed violation and a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken." *Id*. at 563. The Court also required "that the inmate . . . should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." *Id*. at 566.

But since *Wolff*, the Court has repeatedly rejected attempts to apply *Wolff*'s retrospective factfinding procedures to prison situations involving predictive, subjective decisions. For example, the Court explained this difference in the parole setting in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). In *Greenholtz*, the Court rejected a call for *Wolff*-type procedures in parole hearings because "experience has shown, that the parole-release decision is . . . essentially an experienced prediction based on a host of variables," *id*. at 16, one that is "necessarily subjective in part and predictive in part," *id*. at 13, requiring consideration of what "the entire record shows," *id*. at 15. The Court therefore concluded that "[p]rocedures designed to elicit specific facts . . . are not necessarily appropriate." *Id*. at 14. Notably, the interest at stake in *Greenholtz*—parole, or release from prison—was as strong or stronger than the interest in good-time credit had been in *Wolff*. Despite the undoubtedly strong interest in parole, however, the Court found that the predictive and subjective nature of the decision meant that less formal procedures satisfied due process requirements.

The Court again drew this categorical distinction in *Hewitt v. Helms*, 459 U.S. 460 (1983), which involved a type of decision similar to that at issue here—there, a placement in administrative segregation designed to limit problems related to a disruptive prisoner—and it found that such a predictive decision did not call for *Wolff*-type fact-finding procedures. In rejecting such procedures, the Court stressed the predictive nature of the decision: "The judgment of prison officials in this context . . . turns largely on purely subjective evaluations and on predictions of future behavior." *Hewitt*, 459 U.S. at 474 (internal quotation marks omitted).

Importantly, the Court stressed that the judgment involved was not only predictive, but also that it turned on several variables at once, including variables that were not tied to the individual prisoner's record. "[A]dministrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like," requiring officials to "predict not just one inmate's future actions . . . but those of an entire institution." *Id.*

In *Hewitt*, the Court also addressed the other two *Mathews* factors, noting that the government's interest in security was high, while the prisoner's interest in avoiding administrative segregation was low. *Id.* at 475–76. But the Court's emphasis on the nature of the decision demonstrates that that factor was dispositive.

3. *Sandin* did not change *Hewitt*'s application of *Mathews* to predictive decisions.

In Ohio's view, the above cases, from *Mathews* through *Horowitz* to *Hewitt*, are enough to fully answer the question presented, and *Sandin v. Conner* does not even warrant a mention. That is so because *Sandin* dealt solely with the standard for the existence of a liberty interest—an issue that Ohio does not contest here—and that case said nothing about what process is due once a liberty interest is established. Indeed, *Sandin* is so far afield, in our view, that the analysis should proceed directly from the law above to the facts of Ohio's supermax placement process, without any detour whatsoever into a discussion of *Sandin*. This discussion is needed only because the appeals court reasoned that *Sandin* did, somehow, change *Hewitt*'s application of *Mathews*, thus requiring more process here. But it was wrong, as *Sandin* did no such thing.

What the Court did do in *Sandin* was raise the bar on what a prisoner must show to establish that a liberty interest exists at all, in order to trigger *any* due process protection. Before *Sandin*, courts had begun to define state-created liberty interests by looking solely to whether prison regulations had "mandatory" sounding language that implied that a right was enforceable, without regard to the substance of the condition at issue. See *Sandin*, 515 U.S. at 480–83. That led to several undesirable results, including "disincentives for States to codify prison management procedures," and the "involvement of federal courts in the day-to-day management of prisons." *Id.* at 482.

To restore a focus on protecting only serious deprivations in a prison context, the Court held in *Sandin* that a State-created liberty interest would be found only where the deprivation or restraint "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of

prison life." *Id.* at 484. Thus, a State's "mandatory" language in a regulation, although still necessary, is no longer sufficient; an inmate must show "atypicality" and "significance" as well.

Because the *Sandin* Court went on to find that the prisoner there did *not* have a liberty interest under this standard, it did even address the what-process-is-due issue, let alone change the law on that score. Indeed, at the one point where *Sandin* includes a passing reference to what-process-is-due, the Court expressly stated that it was *not* overruling any prior case. See *id.* at 483 n.5. And since *Sandin*, this Court has never cited it in the context of what-process-is-due.

Nevertheless, the Sixth Circuit below found that *Sandin* changed the what-process-is-due analysis. In the court's words "*Sandin* called into question not only the mechanistic way in which the circuit courts previously found liberty interests in prison regulations, but also the mechanistic fashion in which they applied the *Hewitt/Wolff* dichotomy" for determining the process due a prisoner. *Austin*, Pet. App. 18a. In particular, that court concluded that *Sandin* shifted the focus from the nature of the decision and thus the value of extra process—which was the critical *Mathews* factor in *Hewitt* and *Horowitz* and other cases—to the degree of the prisoner's interest. As the court explained it:

> After *Sandin*, both steps of the analysis—the creation of a liberty interest and the determination of the process due to protect that interest—must carefully reference the severity of the deprivation at stake. It is not enough to say that a particular decision is "forward-looking"; instead, reference must be made to the interests at stake, for the inmate and for the state. It is not the nature of the decision which strikes the due process balance; it

> is the nature of the interests on both sides of tha balance.

Id. at 18a–19a. This was the critical part of the court's opinion, as it was the court's shift in emphasis to the prisoner's interest, as a matter of law, that enabled the court to then distinguish this case from *Hewitt* on the facts, as the court later found that the prisoner's interest in avoiding supermax placement was stronger than the interest in avoiding administrative segregation had been in *Hewitt*.

But the Sixth Circuit was wrong, as nothing in *Sandin* instructs courts to now approach the *Mathews* factors with an enhanced focus on the private-interest factor. Nothing in *Sandin* eliminates the common-sense distinction, explained in *Greenholtz*, *Hewitt*, and *Horowitz*, between predictive decisions and retrospective factfinding. If weightier private interests did not require greater process where outright release from prison was at stake in *Greenholtz*, then it is hard to see how *Sandin*'s focus on more "significant" changes in conditions while in prison works such a change. Thus, the Sixth Circuit was wrong to begin the process-due analysis with a "higher presumption of process due than" it would have pre-*Sandin*. *Austin*, Pet. App. 22a n.12.

Indeed, the Sixth Circuit provides precious little explanation of precisely how it believes *Sandin* changed the *Mathews* approach. The court simply said that after *Sandin*, "because only those conditions that constitute 'atypical and significant hardships' give rise to liberty interests, those interests will necessarily be of a weight requiring greater due process protection." *Id.* at 21a–22a. Further elaborating in a footnote, the court added that in comparing "those liberty interests found to exist post-*Sandin* with those found to exist pre-*Sandin* . . . it is important to remember that many liberty interests which required less process in the past would require no process now." *Id.* at 22a n.12. That, said the

court, meant that "[a]ny liberty interest which passes *Sandin*'s threshold comes with a higher presumption of process due than those which may have been found pre-*Sandin*."

It is not entirely clear what the appeals court meant when it said that *Sandin* now creates a "higher presumption of process due." One possibility is that the "presumption" means that *Sandin* calls for courts to apply *Mathews* in a different way from before, applying a greater weighting factor to the private interest than was the case under *Hewitt*, *Greenholtz*, and so on. That seems to be what the court most likely meant. The Court insisted that post-*Sandin* it "is not enough to say that a particular decision is 'forward-looking'" without also looking to the private interest at stake. But in *Greenholtz*, it *was* enough to look primarily at the nature of the decision without giving much weight to the private interest, even where that interest seemed strong. And the Sixth Circuit gave no clue as to how or why *Sandin* overruled cases such as *Greenholtz* in that regard.

Alternatively, it is perhaps possible to read the appeals court's "higher presumption" as just a predictive observation, and not as a warrant to apply *Mathews* differently. That is, *Mathews* applies exactly the same as before in any given case, but *Sandin*'s higher liberty-interest threshold will mean that those cases that clear that threshold will now include a higher proportion of cases that call for *Wolff*-type process.

But reading the court's *Sandin* theory this way raises two separate problems. First, it does not seem to be what the court meant, for as noted above, it did apply *Mathews* in a novel way. Second, even if the court below viewed *Sandin* as merely producing a differential effect, as opposed to changing how to apply *Mathews* in a given case, that more moderate view is still wrong. It is wrong because even a differential-effect theory rests on the flawed premise that the

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degree of a prisoner's deprivation was indeed a major input in the process-due equation, pre-*Sandin*, but that was not the case.

In other words, the appeals court's reasoning would make sense if the pre-*Sandin* cases had created a spectrum based largely on degree-of-deprivation, with smaller deprivations getting some process, and the largest deprivations getting more process. Converting the smaller deprivations into no-process-at-all cases would indeed leave the remaining ones with "more process due." But *Hewitt* and *Horowitz* teach that, where the nature of the decision is predictive and subjective, less process is due *even when the individual's interest seems very strong*.

While *Hewitt* and *Greenholtz* establish this principle in the prison context, *Horowitz* is in many ways the better example, because of its stark comparison with *Goss*, as explained above (at 17–18). In *Horowitz*, the Court found that less process was required for academic dismissal than had been required for disciplinary suspension in *Goss*, *even though* the deprivation in *Horowitz*—outright expulsion—was far more severe than the 10-day suspension imposed in *Goss*.

Indeed, given *Horowitz*'s reasoning and holding, the best way to illustrate the flaw in the appeals court's analysis is to consider what effect, if any, a decision analogous to *Sandin*—but in a school setting—would have on *Horowitz*. That is, suppose that the Court were to hold that, from now on, only more severe deprivations would count as protected liberty or property interests *at all* in the school setting, and suppose further that the Court specified that suspensions did not meet that bar, while more serious consequences such as expulsions would. Such a "*Sandin* for schools" decision would, obviously, reverse the result in *Goss*, as a ten-day

disciplinary suspension would no longer warrant any due process protection at all.

In Ohio's view, though, such a "*Sandin* for schools" decision would leave *Horowitz*—which involved a non-disciplinary expulsion—untouched. Because the nature of the decision would remain the same (i.e., a predictive assessment), both *Horowitz*'s reasoning and result would remain the same. That is, the seriousness of the deprivation would be enough, even after a "*Sandin* for schools," to trigger *some* due-process protection, but, because of the predictive nature of the decision, it would be an informal process, closer to *Hewitt* than *Wolff*.

The Sixth Circuit's reasoning, by contrast, would mean that a "*Sandin* for schools" would reverse *Horowitz*. Because due process protection would then be reserved for "more significant" deprivations, courts would begin with a "presumption" in favor of more process.

The problem with that approach, though, is that, as explained above, the Court has not required "more process" simply because "greater deprivation" is involved. That may be the case *within* the disciplinary context, where heavier discipline may call for more process. But with regard to predictive, multivariate judgments, the degree of deprivation matters much less, as for such decisions, more formal process simply does not add value. Thus, the Sixth Circuit was wrong to reason that *Sandin*, by reserving protection for more-significant deprivations, should require courts to apply a "presumption" in favor of more process.

Finally, although *Sandin*'s liberty-interest holding does not affect the process-due question, *Sandin*'s broader teaching does have meaning here—and that meaning helps Ohio, not the Respondent inmates. The Court explained in *Sandin* that the previous approach to finding State-created

liberty interests, by focusing solely on mandatory language in prison regulations, "create[d] disincentives for States to codify prison management procedures in the interest of uniform treatment." *Sandin*, 515 U.S. at 482. The disincentive occurred because States could easily "avoid creation of 'liberty' interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel." *Id.* The Court properly saw this disincentive as a bad thing, as prisons are better off when they can give written guidance to management and staff, and even to inmates. The Court took the step it did in *Sandin* largely to allow States to make written commitments without the fear of triggering litigation over every detail of prison life, such as tray lunches versus sack lunches. *See id.*

Sandin largely cured that perverse-incentives problem, but the Sixth Circuit's approach, if adopted by the Court, would create a similar, but perhaps worse, problem of incentives with regard to supermax prisons or other potentially significant prison conditions. That incentive problem exists because, after *Sandin*, a prisoner must still show that a State has created a liberty interest through some mandatory language in a regulation, and *in addition*, the inmate must show that the challenged condition involves an "atypical and significant hardship." *Id.* at 484. A "significant" hardship alone does not create a liberty interest without some language, except for the even-more-extreme cases where a liberty interest is not "State-created," but where the Due Process Clause gives protection of its own force, even without State creation. *Id.* at 479 n.4, 484 (citing *Vitek v. Jones*, 445 U.S. 480, 493–94 (1980) (transfer to mental hospital), and *Washington v. Harper*, 494 U.S. 210, 221–22 (1990) (involuntary administration of psychotropic drugs)).

Thus, since even after *Sandin* States can still control whether they create a liberty interest, a decision that requires

burden some procedures every time one exists creates a strong incentive for States to avoid mandatory language in the context of conditions that might be considered significant and atypical. That is, a State may find that its own penological interests in having an established policy make it worthwhile to use mandatory language, and to trigger a liberty interest, if it knows that *Hewitt*-style procedures will still be enough in appropriate cases, e.g., for predictive decisions. But if States know that *Wolff* process, or more, will be "presumed" whenever a liberty interest is triggered, we will have a stronger incentive to avoid creating such interest.

That would turn *Sandin*'s intent on its head, as we would now be free to adopt mandatory language, without risk, regarding tray lunches, but we would feel constrained to give our wardens and staff the least guidance where the greatest issues are at stake. Surely that is not what the Court intended in *Sandin*, and it is not what the Court should cause here.

B. Ohio's policy for placing inmates in supermax provided adequate due process for this type of predictive decision.

Applying the legal framework established above, the ultimate question here, of course, is whether Ohio's Policy would provide sufficient process to the inmates that it classified at the highest-security level, thus causing them to be transferred to Ohio's highest-security prison, the Ohio State Penitentiary. The answer is yes, as Ohio's Policy, before being rewritten by the courts below, gave more extensive procedures than the Due Process Clause requires.

First, and most important, Ohio's placement decisions are the same type of predictive, multivariate decisions that the Court has already found, in *Hewitt* and other cases, to be best suited to informal, non-adversarial proceedings. The

facts here show that placement at OSP is indeed such a decision, and is not a retrospective disciplinary measure. Further, the facts also show that the specific procedures ordered by the lower courts do not add reliability to the decisionmaking process at issue; instead, the extra procedures add costs and degrade the process.

In addition, the remaining two *Mathews* factors—the inmates' private interests and the government's interest—weigh against requiring more process than Ohio provides here. The inmates' interest in avoiding OSP is not that high, as conditions there do not differ much from the highest-security conditions in the next-highest security prison, from which most of the OSP inmates come. Meanwhile, Ohio has a very strong interest in making these placements without unneeded burdens, as we make these judgments in order to preserve safety and protect inmates throughout the system.

1. Ohio's decisions to place prisoners in OSP are ill-suited to the *Wolff*-type procedures that the court below imposed.

a. OSP placement is a predictive, subjective, multivariate judgment, not a disciplinary punishment.

The decision to classify an inmate at Level 5, and thus to send him to OSP, is a textbook example of the type of predictive, subjective, multivariate judgment that the Court discussed in *Hewitt* and *Greenholtz*. That is so because Ohio does not place an inmate at OSP as punishment for a specific act; instead, we put an inmate there when prison officials judge that the system as a whole is better off if that inmate is at OSP. That decision calls for professional judgment based on many factors, including factors related to the system as a whole, not just the individual inmate's record.

In a study by the National Institute of Corrections, an arm of the United States Department of Justice, corrections expert Chase Riveland explained how "supermax" placements generally are subjective, involving prediction and future risk assessment. "Diagnosis, prediction, risk assessment and identification of causal factors to violent acting out often defy objective criteria and invite a significant degree of subjectivity. Prison administrators should be cognizant of that difficulty in defining admission, release and length of stay criteria." Riveland, *supra*, at 9.

The study's author, Dr. Riveland, along with other corrections experts such as Dr. James Austin, also testified at trial about how Ohio's specific system calls for judgments that cannot be reduced to mechanical factfinding. J.A. 381–83 (Riveland Test.), 432, 433–34 (Dr. Austin Test.). Dr. Austin explained how objective data are part of the equation, but that subjective judgment must be applied to the data:

> Well, there are factors that you would look at that need to be evaluated and that should be done based on objective data, but *ultimately it's going to be a subjective judgment* by a person or an office which is going to be *based on their experience and how they feel about the risk.*

Id. at 433 (Dr. Austin Test.) (emphasis added).

The Policy itself demonstrates how the process is future-oriented, not retrospective, as it looks at past behavior as a guide to whether future problems are likely. For example, it asks whether "[t]he nature of the criminal offense committed prior to incarceration constitutes a *current threat* to the security and orderly operation of the institution and to the safety of others." Policy § VI(C)(2), J.A. 21 (emphasis added). It further looks to whether "the inmate, through

repetitive and/or seriously disruptive behavior, has demonstrated a *chronic inability* to adjust to level 4B *as evidenced by repeated class II rule violations*." Policy § VI(C)(9), J.A. 22 (emphasis added).

Of particular note, the Policy allows for inmates to be classified at Level 5 immediately upon entering the prison system. That shows that the system is not punishing inmates for in-prison behavior, but is trying to predict which inmates belong at each security level. Of course, that often requires consideration of a prisoner's past behavior, just as the predictive decision in *Horowitz* included consideration of the student's past performance, but the decision itself is prospectively focused.

Dr. Austin also explained how such a placement decision does not rest solely on the individual inmate's record, but also turns on factors related to the prison system as a whole. He testified that prison officials often "are looking at the overall situation in the entire prison system . . . if things are problematic elsewhere, they are going to be reluctant to be releasing people that have a history. So they are looking at the entire picture." J.A. 451 (Dr. Austin Test.).

In every respect, Ohio's placement decisions are akin to the administrative-segregation decision at issue in *Hewitt*. In particular, the Court in *Hewitt* explained not only the predictive and subjective aspects of such placement decisions, but also how such decisions involve facts outside an individual inmate's file:

> [P]rison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*,

> and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents.

Hewitt, 459 U.S. at 474. The same is true here. Consider, for example, a decision whether to retain a known gang leader in OSP, or whether to return him to the next-lower security level. Even if that gang leader has been a model inmate at OSP, officials may decide that it is not worth the risk to return him if tensions between rival gangs have been especially high lately, or if his old gang has had internal leadership battles.

For the most part, the appeals court's decision did not seem to turn on a dispute over whether Ohio's placement decisions truly have these characteristics. Rather, the court ruled against us primarily on the theory that *Sandin* shifted the focus away from the nature of the decision. *Austin*, Pet. App. 18a–19a. In conjunction with that shift-of-focus, the Sixth Circuit also said that the inmates' interests weighed more heavily here than in *Hewitt*. *Id.* at 21a–23a.

But the appeals court did seem to view Ohio's process as retrospectively focused, and to the extent the court did so, it was wrong. The Sixth Circuit said that Ohio, under its own regulations, "can place inmates at OSP only in the presence of certain factual predicates, all of which are historical in nature." *Id.* at 23a. Thus, said the court, because Ohio "set out a detailed and restricted list of reasons why inmates can be put at OSP," we cannot "turn around and argue that the district court's order decreases [Ohio's] ability to rely on 'rumor, reputation, and even more imponderable factors,' for those factors are illegitimate under [Ohio's] own placement

scheme." *Id.* This view is wrong both because it misreads our Policy and because it creates perverse incentives.

It misreads our Policy because, while the Policy sets substantive criteria for classification decisions, it calls for officials to apply those criteria to already-established facts, and it does not call for factfinding at any step in the process. For example, officials look to whether an inmate has a record of disruptive behavior, but officials look to the record of findings by the Rules Infraction Board and take those findings as a given; they do not investigate the facts to determine *whether* the inmate has been disruptive. Then, taking those established disruptions as a *starting point*, the officials determine whether that level of disruptions warrants an inference of ongoing or future problems, and thus warrants a Level 5 classification.

The Sixth Circuit's description further misreads the Policy in that the Policy not only calls for officials to work with existing facts, as opposed to instigating factfinding, but the Policy also does not set any evidentiary threshold of proof that officials must use before relying on a given piece of information. Thus, for example, a Level 5 classification may be appropriate if the "inmate has been identified by the institution Security Threat Group Coordinator as a leader" of a gang. Pet. App. 128a. But the Policy does not require the Coordinator to meet any certain proof standard; the Coordinator may rely on "rumor" or "reputation," if accurate in his professional judgment, in identifying an inmate as a gang leader. *Austin I*, Pet. App. 115a–16a; see *Hewitt*, 459 U.S. at 474. The classification committee and other officials may then take the Coordinator's judgment as a given, without conducting factfinding regarding the inmate's gang membership. All of this demonstrates that the Policy was never meant to have a factfinding aspect, yet the decision below tries to force the Policy into that model.

The Sixth Circuit's view also creates negative incentives. The court used Ohio's self-imposed limits as a baseline, implicitly assuming that due process demands at least that much, and then the court imposed more procedures on the theory that the additional steps are only keeping us to our own promises, or are not adding that much more. But Ohio submits that our Policy gives far more than the Constitution requires, both substantively and procedurally; and we urge that we should not be penalized for doing so.

In sum, Ohio's OSP placement decisions are precisely the type of decision that this Court discussed in *Hewitt*. And as shown below, our own adopted Policy more than satisfied due process for that type of decision, and the added procedures imposed by the courts below do not aid the decisionmaking process.

b. The court-ordered modifications do not reduce the risk of error or otherwise add to the quality of the decisionmaking.

The ultimate question in any process-due case is this: would extra process add any value? The nature-of-decision analysis above ties in to this factor, because if the question is "what happened?," then *Wolff*-type procedures might help, but if the question is "what might happen?," then adversarial factfinding will likely not enhance the process significantly. Here, the process will not be aided at all by the procedures that the courts below imposed upon Ohio, and that is shown not only by viewing the nature of the decision, as explained above, but it is also demonstrated by reviewing the specific changes that the court ordered.

As an initial matter, any such court-ordered procedures would be appropriate only if the court first found an unacceptable "risk of error" in the process to begin with—yet both courts below erred in analyzing that issue. In assessing

the "risk of error," it is important to note that Ohio voluntarily abandoned its old policy and adopted New Policy 111-07 during the trial. Thus, that New Policy should have been the benchmark. Yet the Sixth Circuit implicitly held us to the earlier, abandoned policy when it faulted Ohio for "past erroneous and haphazard placements at OSP, which go unchallenged on appeal." *Austin*, Pet. App. 22a. Even if mistakes were made in the past, our latest Policy more than cured any such problems. But nowhere in its opinion did the appeals court specifically state that the New Policy was inadequate; rather, it proceeded directly to saying that the changes ordered by the district court were appropriate.

And while the district court expressly found that even the New Policy was not good enough, it based that finding almost exclusively on its conviction that full-fledged *Wolff* procedures set the standard that we had to meet. *Austin I*, Pet. App. 105a ("Because of the liberty interest involved resulting from the length and the conditions of confinement at the OSP, and the Court's discussion of the *Mathews* factors, the Court holds that the plaintiffs are entitled to the minimal procedural requirements announced in *Wolff*.").

The district court thus imposed, and the appeals court upheld, several *Wolff*-based procedures. The court ordered prison officials to give a detailed advance notice, and equally important, it said that officials could not consider any information that was not expressly disclosed in the notice. That modification alone is an improper burden, as it not only requires prison officials to document every possible piece of information before the hearing, but by prohibiting officials from considering anything outside the notice, this "procedural" requirement restricts the *substantive* scope of the inquiry. If new information surfaces between the notice and the hearing, the officials' hands are tied. But it is hard to see how this restriction offers *any* countervailing benefit in

terms of improving the quality of decisionmaking, as it can act only to exclude relevant information.

The other court-ordered changes are equally inappropriate, as they, too, fail to add value to the process. The ordered changes, though varied in specifics, all share one common feature: they are perhaps perfectly sensible for disciplinary proceedings, but carry little or no value—but do impose great cost—for predictive placement decisions. For example, the court insisted that prisoners be able to call witnesses, subject to a showing of a security risk. Calling witnesses makes sense if the question is "what happened?" But here, the question is whether prison officials predict that this inmate will be a problem if left in, or returned to, a lower security level. His fellow inmates' opinion adds little to *that* question.

Similarly, the court restricted ODRC's ability to rely on confidential information, but that restriction is improper in light of the nature of the decision at issue. Confidential information may be relevant not only to the inmate at issue, but such information may be relevant to officials' consideration of the broader prison system environment, beyond this individual. For example, prison officials may have inside knowledge that rival gang tensions are rising, or preliminary indications that a riot may be coming. Limiting the use of that information—or, just as bad, requiring the officials to document that information in a written opinion—makes no sense.

All of these procedures might make sense, again, if the procedures at issue were disciplinary proceedings, as in *Wolff*, but they are not. The only aspect of the placement process that is even superficially similar to *Wolff* is the fact that prison officials look to past disciplinary problems—specifically, to "convictions" by the Rules Infraction Board—as a part of the placement process. Policy § VI(C),

J.A. 20–22 But the mere use of such retrospective data, whether as part of the package or even as a primary driver, does not convert a prospective question into a retrospective one, just as the use of historical data in *Horowitz* or *Hewitt* did not convert the inquiries there in retrospective ones.

And even if this retrospective aspect raises some *Wolff*-type concerns, such concerns are fully answered by the fact—entirely overlooked by the court below—that Ohio's inmates *already receive* full *Wolff* procedures in any RIB hearings that might provide predicate facts for any later placement decisions. Ohio Admin. Code § 5120-9-07. Thus, to the extent that any inmate wishes to challenge the facts of any past discipline problems, he has the chance in that disciplinary process. If, later, cumulative discipline issues lead to a proceeding over potential OSP placement, there is no need to reopen the results of prior *Wolff*-compliant hearings.

Indeed, the Court has repeatedly indicated that due process does not require, in a second hearing, relitigation of facts that were previously established in some prior hearing that already provided due process. For example, in *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court required extensive due process protections in parole revocation proceedings, as the government had to adequately establish the predicate facts of a parole violation before revoking parole. *Id.* at 483–84. However, the Court added that the "parolee cannot relitigate issues determined against him in other forums, as in the situations presented when the revocation is based on conviction of another crime." *Id.* at 490. And in *Wolff*, the Court required written opinions in disciplinary proceedings, in part to establish a solid record for later use by other bodies for other purposes. *Wolff*, 418 U.S. at 564–65. The Court specifically noted that the disciplinary records might be used later in parole proceedings

or "might furnish the basis of a decision by the Director of Corrections to transfer an inmate to another institution because he is considered to be incorrigible by reason of frequent intentional breached of discipline." *Id.* at 565.

In other words, *Wolff* itself anticipated the situation we have here, in which prior disciplinary records are referred to as a basis for later transfer decisions. In *Wolff*, the Court said to get the record right the first time precisely because there would not be a new factfinding the second time. Yet the court below ordered Ohio to relitigate established facts. That relitigation adds no value, and is thus unwarranted.

The procedures imposed on Ohio are improperly burdensome for yet another reason—they override, without justification, the deference that should be given to the expert judgment of Ohio's prison officials. That expertise has two components, both of which call for more deference here. First, prison officials have expertise in making the substantive decisions at issue here, regarding security classification of inmates. The Court has repeatedly explained that the problems of prison administration "are not readily susceptible of resolution by decree," *Turner v. Safley*, 482 U.S. 78, 84 (1987) (internal quotation marks omitted), and that "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment," *Sandin*, 515 U.S. at 482.

Second, the prison officials' expertise includes not only the substantive area of prison placement, but it also includes expertise in designing procedures that best meet those substantive goals without unneeded red tape. In *Mathews*, the Court explained this independent strand of expertise regarding establishing procedures: "In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the

procedures they have provided assure fair consideration of the entitlement claims of individuals." *Mathews*, 424 U.S. at 349. Here, Ohio's prison officials, in performing their duty to "manage a volatile environment," carefully determined what level of process to provide, and *that* decision warrants deference as well.

Moreover, Ohio's judgment that *Wolff*-type procedures are unneeded here is echoed by the judgment of corrections officials around the country. At least 32 States and the federal government operate supermax prisons, and to the best of our knowledge, not one provides procedures even close to what the courts below ordered here. Indeed, Ohio's Policy, without the court-ordered modifications, provides for more than most or all other jurisdictions. California, for example, provides for non-disciplinary supermax placement if an inmate is "deemed to be a threat to the safety of others or the security of the institution," and that determination is left solely to officials' discretion, without any hearing or other required process. See Cal. Code Regs., tit. 15, § 3341.5(c)(1). And the federal government's process for assigning inmates to supermax facilities involves only assessments by prison officials, without any required role for the inmate to participate. See U.S. Bureau of Prisons Security Designation And Custody Classification Manual, Program Statement 5100.07, Chapter 10, Inmate Transfers, at 11–13 (referral procedures and criteria for transfer), available at http://www.bop.gov.

In sum, the procedures ordered by the lower courts do not add to the quality of the decisions at issue, and they intrude upon the province of prison officials. That is reason enough to reverse the judgment below. Moreover, as shown below, the remaining *Mathews* factors also weigh against requiring more process here.

2. The prisoners' interests here are minimal.

The court below found that the inmates' interest in avoiding OSP was the critical factor, outweighing the nature of the decision and weighing in favor of more procedures here. *Austin*, Pet. App. 21a–22a. Again, for all the reasons in the above sections, this strong focus on the private interest is the wrong analytical route. But even if the court below had been right to give greater weight, post-*Sandin*, to the inmates' interest, that framework would still not justify requiring more process here. That is because, contrary to the opinions of the courts below, the prisoners' interests in avoiding OSP is not especially high, for, as in *Hewitt*, they were "merely transferred from an extremely restricted environment to an even more confined situation." 459 U.S. at 475.

Life at OSP is not measurably "worse" than life at Ohio's next-highest security level, and 89.5% of OSP inmates when OSP first opened came from that next-highest level. J.A. 167. To be sure, OSP has more restrictive conditions on inmate interaction and on various privileges. But on the other hand, OSP offers better conditions in many ways. Personal security, relations with staff, programming and property privileges are all better at OSP than at other Ohio prisons. J.A. 351–52, 357 (Ishee Test.). And the very features that are often condemned most—the generally restrictive atmosphere and specifically the in-cell isolation for almost all of the time—are a benefit for those who prefer not to face threats from the general population or from their own cellmates.

Indeed, the prisoners' own view supports the idea that the tradeoffs make OSP preferable for many. As one report introduced at trial indicated, "[s]ome inmates [] indicated" that OSP "is better than . . . Lucasville," the prison housing inmates in the security classification immediately below

supermax status, because "individual cells are larger, more personal property is permitted, and [] they don't have to worry about assaults from other inmates." Plaintiffs' Ex. 11 (Peter Davis, *Inspection Report: Ohio State Penitentiary* (1999)).

And for many prisoners, actions speak louder than words. After the trial in this case, Ohio began a policy of allowing Level 4 inmates (i.e., those below Level 5) to *volunteer* to go to OSP, or in the case of many, to stay at OSP when they were reduced from Level 5 to Level 4. Hundreds of inmates have elected to do so. While Ohio recognizes that these voluntary placements are not at issue in this appeal, the fact that these volunteers exist is quite telling, and is germane to weighing the inmates' private interests and thus to the *Mathews* analysis. Cf. *Sandin*, 515 U.S. at 486 n.9 ("Conner's own expectations have at times reflected a personal preference for the quietude of the [Special Housing Unit]. Although we do not think a prisoner's subjective expectation is dispositive of the liberty interest analysis, it does provide some evidence that the conditions suffered were expected within the contour of the actual sentence imposed.")[1]

That is not to suggest that all inmates prefer OSP, or that life at OSP is idyllic. But it is to say that, contrary to the

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[1] In a post-trial enforcement proceeding, Respondents alleged that Ohio's allowance of these voluntary transfers violated the order now on appeal. The district court found that the voluntary nature of the transfers precluded any due process violations. See Order of May 15, 2003 at 18-24, 22 (Record Entry 414) ("Level 4 inmates consistently testified that they had voluntarily chosen to remain at the OSP.") That order is on a separate appeal to the Sixth Circuit (pending as Case No. 03-3840).

lower courts' shared conclusion that living conditions at OSP differ dramatically from those at other prisons, those differences are, in the end, relatively minor. At any rate, the differences are not so great as to alter the *Mathews* analysis significantly from what it was in *Hewitt*.

Apart from day-to-day living conditions, the court below also pointed to a suspension of parole eligibility as a major factor in increasing the weight of the inmates' interest in avoiding OSP. Under Ohio's policy, no inmate may be considered for parole while he is in a Level 5 security status. But this factor is not as weighty as the appeals court found. First, almost 90% of Level 5 inmates came to that status from Level 4, and Level 4 inmates are also ineligible for parole. See Plaintiffs' Ex. 10, Table 9, J.A. 167 (noting 89.5 % came from Level 4); Pet. App. 64a n.10 (noting that parole is possible only from Levels 1–3, then called minimum, medium, and close); ODRC Policy 501.36 § VI(D)(7)(d), J.A. 152 (barring parole for "maximum security," now Level 4). Thus, for those inmates, reclassification to Level 5 did not change their parole status.

Second, Ohio abolished parole in 1996, but maintained the system for those who had already been convicted under our old system. Thus, for any Ohio inmates sentenced since then, the "no-parole-eligibility" rule means nothing.

Finally, for those remaining inmates for whom the parole effect has meaning, it most likely has much less effect in practice than it might seem. To be sure, the rule creates a bright-line rule against parole for such inmates. But as a practical matter, the affected inmates are those who the system has already determined cannot be trusted to safely remain in the general prison population. Thus, it seems unlikely that many would be found ready to leave prison and re-enter society.

On top of the general conditions and the loss of parole eligibility, the courts below also pointed to the length of stay at OSP as a feature distinguishing the placement decisions here from administrative-segregation assignments as in *Hewitt*. A Level 5 placement is reviewed annually, so all prisoners spend at least a year at OSP, with most spending two or more years there. But, while this Court has not set an outer time limit on its *Hewitt* principle, lower courts have repeatedly endorsed lengthy stays in administrative segregation without more than *Hewitt* process. *Clark v. Brewer*, 776 F.2d 226, 228 (8th Cir. 1985) (seven years in "austere and restrictive" confinement); *Mims v. Shapp*, 774 F.2d 946, 948, 949, 951 (3d Cir. 1984) (five years in conditions similar to OSP); *Shoats v. Horn*, 213 F.3d 140, 142, 144 (3d Cir. 2000) (eight years in OSP-like conditions).

Finally, all of these private-interest issues are more than offset by the enhanced protections afforded here relative to *Hewitt*. Unlike in *Hewitt*, most inmates considered for elevation to Level 5 have already been found guilty of disruptive behavior in *Wolff*-compliant disciplinary proceedings. Further, they are given the opportunity to make their case orally during both placement and retention proceedings and are given written decisions at both, protections absent in *Hewitt*. See 459 U.S. at 489–90 (Stevens, J., dissenting). Finally, they are given multiple levels of appellate review, a protection that neither *Hewitt*—nor *Wolff*—contemplate. That more than compensates for whatever marginal differences exist between this case and *Hewitt* in regard to an inmate's private interest.

3. Ohio has a strong interest in maintaining prison security without unnecessary burdens.

Finally, Ohio's interests here weigh strongly against requiring more process than our Policy gives. Ohio has a duty to protect staff and fellow inmates from those inmates

who might be a threat. As Respondents' leadoff witness acknowledged, "[H]uman rights concerns cut both ways . . . . We are concerned about the rights of inmates to be safe and free from assaults or being preyed upon by dangerous inmates." Trial Tr. Vol. 1, at 81 (Fellner Test.). And indeed, Ohio has seen a drop in problems in other prisons in the years since we opened OSP. J.A. 454–56 (Meyer Test.).

The appeals court dismissed the strength of this interest by saying that Ohio could simply use the alternate tool of administrative segregation to achieve the same goals with less burden. *Austin*, Pet. App. 22a. But this blithe assertion was wrong. Ohio's sole Level 4 prison (i.e., at the level just below OSP/Level 5) has an administrative segregation wing with just 20 cells. *Austin* I, Pet. App. 51a. That would not fully meet Ohio's OSP needs.

In short, Ohio needs OSP, and we also need the flexibility to use that facility without unnecessary layers of court-imposed red tape. As *Mathews* recognized, the government's interest in any due-process balancing includes consideration of both the "function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. Thus, not only is the ultimate function of the placement decisions—prison safety—a concern, but so, too, is the cost of complying with the court-imposed procedures.

Here, the cost of complying with the lower courts' orders comes in several forms. First, as explained above (at 40–41), these "procedural" burdens carry a substantive cost in restricting our discretion in placement decisions. The appeals court purported to overrule the district court's substantive policy modifications, keeping in place only the procedural changes. To the extent the appeals court did reverse those substantive changes, it was right to do so. But the ostensibly procedural notice requirement—that the

inmate be told precisely what evidence will be weighed at his hearing—has the substantive corollary that, once the hearing arrives, officials may not consider any information left out of the notice. That constraint has real effects on decisionmaking, and the effects are not positive.

For example, the constraint on using confidential information forces officials to make a terrible choice. If they decide to go forward without using the information, the decisionmaking is hobbled by the exclusion of relevant information. But if officials wish to include information from a confidential informant, they must "disclose to the inmate as much of the substance of the information as possible." Pet. App. 41a. That disclosure creates the risk that the informant's identity will be discovered, if--as is possible—the inmate receiving the information, or his friends or fellow gang members, know that certain information could have come from only one source. That has drastic and, indeed, deadly implications for the informant.

Less dramatically, the court-ordered procedures consume time and resources. The appeals court discounted this concern simply by asserting that the burdens are not great, without specifically addressing the time element. *Austin*, Pet. App. 21a–24a. The district court, by contrast, specifically found that its requirements would "cause minimal hardship," and it insisted, "officials would only need to expend the additional time to write out their reasons for making a specific classification decision." *Austin* I, Pet. App. 104a–05a. This insistence is ironic, because at another point in its opinion, the district court faulted Ohio for having decisions made by the chief of the Bureau of Classification, who, in the court's view, was already too busy to give much time to such decisions: "The potential for error is little improved under the newly proposed system because it merely gives the final decision to the chief of the Bureau of Classification, an individual who also has a multitude of

responsibilities and little time to consider each case carefully." *Id.* at 103a. The court did not explain how it was improving things to give more work to already busy officials, unless its implicit view was that the work should be transferred to another candidate. But the wardens and the director of the prison department are equally busy, and surely the court did not mean to suggest that we need to hire someone solely to process OSP placements—or if that is the implication, then the burden of that is self-evident.

Consequently, Ohio's legitimate penological interests —which here are ultimately the safety interests of every inmate—weigh heavily against the imposition of the court-ordered procedural hurdles here.

CONCLUSION

For the above reasons, the judgment below should be reversed.

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